

## Kolbo, Delaine

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**From:** exedir@sdonecall.com  
**Sent:** Monday, December 22, 2003 8:52 PM  
**To:** Kelly.Frazier@state.sd.us  
**Cc:** Terri.Iverson@state.sd.us; Delaine.Kolbo@state.sd.us  
**Subject:** Re: OC03-014 Dismissal

I do not believe the statute provides the homeowner a depth of "12" to dig without hand exposing. I believe the statute is restricted to "gardening" for a homeowner and 18" for agricultural or farming.

In the instances cited, the line was accurately marked so the homeowner clearly knew that a line was at the specific location...the homeowner did not have any knowledge of the 18" restricted area for hand digging or non-invasive excavation (vacuum excavation). He was operating a bobcat when the line was damaged, which is a clear statutory violation.

After my discussion with the individual, it was my impression that he clearly understood that an accurately marked line was hit and that he was operating mechanical equipment in the hand dig zone. He was more concerned with the fact that he had been billed for placement of a drop which had not yet happened and he wanted to coordinate where the drop was placed to insure that it was not in the location of future construction.

I referred the matter to Paul Lowe so that they may resolve non-statutory issue.

If further questions arise, let me know ... I am certain that it is the Board opinion that "depth" is not an issue that would provide an excuse to avoid one call notification or to excavate in the hand dig corridor.

Quoting "Kelly.Frazier@state.sd.us" <Kelly.Frazier@state.sd.us>:

> Larry,  
>  
> Per request from staff, I have looked into the above complaint. Consumer  
> affairs was looking into this and I advised them to tell the person to go to  
> the OCB b/c the complainant was being billed for hitting a wire that he  
> claimed within the corridor (12 inches) that does not require a locate  
> ticket (SDCL 49-7A-1(3)). They filed the complaint and my understanding is  
> that they agreed to have it dismissed b/c they didn't cite any specific  
> violations in their complaint. Upon further scrutiny I have to agree that  
> there is no rule demanding burial to a mandatory depth. I should have  
> considered this problem and I gave Terri some bad advice. The filing was my  
> fault and I take responsibility. Sorry about that guys.  
>  
> My concern is this: our rules say that a landowner can safely break ground  
> down to 12 inches without making a call. There is strict liability if they  
> go below that depth and hit something. I don't see how a company can bill  
> when their facility is located above that depth. There appears to be an  
> assumption of risk on the part of the company and an implied obligation to  
> go below 12 inches. Two questions:  
>  
> 1) Perhaps the facility was deep enough at one time, but erosion or  
> compaction caused it to be above the 12 inch line  
> 2) How do we really KNOW that the complainant was within that 12 inch "safe"  
> zone?  
>  
> It seems to me that if a person strictly liable for damage when they dig  
> below 12 inches w/o a ticket, then the homeowner should be considered  
> liability free if they follow our rules and don't go below 12 inches, yet  
> still hit a facility.  
>  
> There is no rule requiring that Qwest put their lines over 12 inches deep,  
> but if their line is hit above 12 inches, I disagree with holding the  
> landowner liable as a matter of policy. Assumption of risk, "statutory  
> waiver" or "implied obligation" should say the facility owner loses the

> right to bill absent a showing of negligence in violation of SDCL 49-7A-10  
> or by general negligence standards.  
>  
> Though the landowner does not appear to have the right to bring a complaint,  
> I feel they do have a defense to the billing. I was curious if the facts you  
> reviewed were consistent with the facts as I understand them. Also, my  
> instinct is to contact the complainant and advise them that they have a  
> defense to the billing irregardless of their rights under the rule. They  
> could refuse to pay on this basis and 1) bring a small claims injunction  
> action against Qwest requesting an Order prohibiting billing or 2) Make  
> Qwest file a complaint against them with the OCB or a small claims court.  
> Any objections to this?  
>  
> Also, didn't this issue come up once before when a line was beneath an alley  
> that had gotten compacted and brought a gas line up close to the surface?  
> How was that one resolved?  
>  
> Thanks Larry.  
>  
> Kelly.  
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